**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **JACK SHANE** | ) | |
| Claimant | ) | |
| | ) | |
| VS. | ) | |
| | ) | |
| **TREASURE CHEST ADVERTISING** | ) | |
| Respondent | ) | Docket Nos. 265,067 & |
| | ) | 265,698 |
| AND | ) | |
| | ) | |
| **CONTINENTAL CASUALTY** | ) | |
| Insurance Carrier | ) | |

## ORDER

Claimant requested review of the February 23, 2004 Award by Administrative Law Judge (ALJ) Robert H. Foerschler. The Board heard oral argument on July 27, 2004.

### APPEARANCES

James L. Wisler, of Lawrence, Kansas, appeared for the claimant. John D. Jurcyk, of Roeland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

### ISSUES

The ALJ awarded claimant a 26 percent functional impairment to the whole body as a result of two separate work-related injuries occurring on February 23, 2001 and

April 10, 2001.[1] He concluded that while the evidence substantiated the 26 percent functional impairment based upon the testimony of Dr. Truett L. Swaim, nevertheless the claimant was not entitled to the enhanced work disability benefits provided by K.S.A. 44-510e(a), because claimant failed to seek out appropriate employment with the employer. He also rejected respondent's contention that claimant had a preexisting impairment because claimant had performed his work for respondent and others without any apparent difficulty for a period of years.

Claimant contends he is entitled to additional benefits beyond the functional impairment for his work disability as he was unable to return to his job with respondent as a press operator. Claimant alleges the ALJ erred in concluding that his failure to actually apply for work with respondent defeats his claim for work disability benefits. Claimant argues that Kansas law does not compel him to apply for employment with respondent and even if it did, he went to respondent's place of business and requested accommodated work, which they failed to offer. In addition, his attorney wrote to respondent's counsel and requested an accommodated position. When no job was offered, claimant sought out alternative employment as a taxi driver, a position that leaves him with a 49 percent wage loss when compared to his pre-injury average weekly wage while employed by respondent.[2] When that figure is averaged with the 47 percent task loss suggested by Dr. Swaim, the result is 48 percent. Accordingly, claimant maintains he is entitled to a work disability of 48 percent rather than just the 26 percent awarded by the ALJ.

Respondent asserts a variety of arguments, some of which are aimed at the underlying compensability of the accidents as well as others which take issue with procedures utilized by the ALJ during the course of the claims. They are as follows: 1) whether claimant sustained personal injury by accident, 2) permanent injury, 3) the nature and extent of the injuries attributable to each accident, 4) whether claimant is entitled to work disability benefits, 5) whether respondent is entitled to a credit for any preexisting impairment, 6) whether respondent should be assessed the cost of the independent medical examination, and 7) whether the ALJ had the authority to issue a Supplemental Decision in October, 2001.

In short, respondent contends the medical evidence fails to establish a physical change in claimant's physical condition following either the February 23, 2001 or April 10, 2001 accidents. Rather, respondent alleges claimant's complaints to his low back are attributable to an unrelated accident that occurred in January 2001, which he failed to

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[1] These accidents were the subject of two separate docketed claims and were consolidated pursuant to an Order entered by the ALJ on June 8, 2001.

[2] At oral argument claimant's counsel alleged claimant was entitled to a wage loss finding of 51 percent. Counsel represented that the claimant's post injury wage loss was $278.63. When compared to the pre-injury wage of $563.64, the result is approximately 49 percent loss rather than 51 percent.

disclose to all of the physicians. Respondent further contends that after treatment for the two alleged accidents, claimant appeared on respondent's premises inquiring about work, but failed to complete an application form or make any effort whatsoever to apply for work. Thus, respondent maintains this failure constitutes a lack of good faith and justified the ALJ's refusal to award work disability benefits. Respondent also maintains the ALJ erred in issuing separate factual findings with respect to functional impairment and/or work disability attributable to each of the separate accidents and also taking into consideration the claimant's preexisting impairment in issuing his Award.

In addition, respondent's counsel particularly emphasized his last two issues when he appeared before the Board. Respondent argues it should not be solely responsible for the cost of an independent medical examination. Respondent further contends that the Supplemental Order which followed the independent medical examiner's report was done without proper authority and should therefore be reversed and the findings contained therein disregarded.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant has a history of low back problems dating back to 1983 when he had a lumbar laminectomy. Thereafter, he returned to the workforce and was generally asymptomatic for most of the time. He was involved in a motor vehicle accident in 1997 which caused temporary increased symptoms in his back. Then, on January 1, 2001, he slipped and fell at home, again injuring his back. Claimant sought treatment from his physician and was off work from his job as a press operator for respondent for a period of two weeks. He returned to his normal job duties on January 16, 2001.

On February 23, 2001, claimant was working with another employee to lift a large, heavy roller into a large web press when he experienced pain in his low back. He told his employer a "couple of days" after the injury and was provided with treatment. Claimant was placed on light duty, working on a "quarter fold" machine. He continued in that position until April 10, 2001, when he again hurt his back lifting an unexpectedly heavy lid on the machine. Claimant again advised someone in the human resources department of his injury. He has not worked for respondent since April 10, 2001.

Claimant's care was provided by Dr. Jeffrey T. MacMillan, a board certified orthopaedist. Dr. MacMillan first saw claimant on May 1, 2001. Claimant initially did not disclose the 1997 motor vehicle accident or the slip and fall accident he sustained in January 2001. Rather, claimant attributed his onset of low back pain to his work-related injuries in February and April 2001. At some point, however, Dr. MacMillan gleaned from the medical records that claimant was injured in a slip and fall accident in January 2001.

Dr. MacMillan diagnosed claimant with age-related degenerative changes at the L4-L5 level.[3] Dr. MacMillan asked to see a prior MRI, one dating back to January 12, 2001, shortly after his slip and fall, and another from April 10, 2001. When the two of those were compared, he concluded there was some slight disk bulging at the L4-L5 level and some disc desiccation at upper levels in the lumbar area.

Dr. MacMillan also reviewed the medical records generated in connection with claimant's slip and fall accident on January 1, 2001, approximately 7 weeks before his first alleged work-related accident. According to Dr. MacMillan, claimant's low back complaints preceded the onset of his alleged work symptoms and the MRIs failed to document any physical change in claimant's back. As a result, treatment was discontinued by respondent.

When treatment was not forthcoming from the respondent, the claimant sought preliminary relief from the ALJ. Following a hearing, the ALJ issued an order in which the ALJ did not decide claimant's request for preliminary hearing benefits, but instead ordered an independent medical evaluation (IME) by a neutral physician, Dr. Glenn Amundson, to speak to the issue of causation and whether claimant sustained a new injury and/or an aggravation of a preexisting condition as a result of his work-related accident(s).[4]

On September 11, 2001, the ALJ received Dr. Amundson's August 8, 2001 medical report. This report reflects Dr. Amundson's opinion that claimant's present condition represents a new injury that occurred at work. On October 1, 2001, the ALJ entered a Supplemental Decision in which he awarded claimant the requested preliminary hearing benefits.[5] Respondent took exception to the ALJ's Supplemental Decision appealing to the Board, alleging the claimant did not injure his back on either February 23 or April 10, 2001. Respondent further argued that the ALJ lacked jurisdiction to enter a Supplemental Decision without first granting respondent an opportunity to be heard regarding Dr. Amundson's report so that it could point out certain factual omissions.

The Board issued its Order on March 18, 2002, and affirmed the ALJ's Supplemental Decision. The Board found that claimant sustained his evidentiary burden to establish that he sustained personal injury by accident arising out of and in the course of his employment with respondent.[6] The Board went on to reject respondent's argument challenging the ALJ's authority to issue the Supplemental Decision. In doing so, the Board explained:

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[3] MacMillan Depo. at 12, Ex. 2 at 35.

[4] ALJ Preliminary Decision (filed June 27, 2001).

[5] ALJ Supplemental Decision (filed October 1, 2001).

[6] Order (Mar. 18, 2002) at 2.

> It is not uncommon for the workers compensation judges to take preliminary hearing requests under advisement while waiting for independent medical evaluations. Judge Foerschler did not specifically announce that he was taking claimant's request for preliminary hearing benefits under advisement until receiving Dr. Amundson's report, but that is what occurred. Although it is much preferred that the Judge make such announcements either on the record or in writing, Judge Foerschler did not err by entering the October 1, 2001 Supplemental Decision without additional notice to the parties or conducting another hearing.[7]

The Board's Order goes on to point out that respondent is not without relief from this result:

> The legislative intent behind the Workers Compensation Act was to provide benefits to the injured workers with minimal delay. Accordingly, preliminary hearings are intended to be held quickly and intended to be summary in nature. The Act does not limit the number of preliminary hearings that may be held and, thus, allows the workers compensation judge to hear additional evidence as it develops and to modify the preliminary hearing award as the facts dictate. Accordingly, respondent and its insurance carrier have the opportunity to present additional evidence to Judge Foerschler at a later hearing.[8]

Consistent with the ALJ's Supplemental Decision, Dr. MacMillan was authorized to provide treatment and ultimately he performed surgery on claimant's back, in the form of an anterior interbody fusion at L4-5. Following surgery, claimant was referred to a work conditioning program, but was unable to complete that program as he was the primary caregiver for his daughter.

Dr. MacMillan last saw claimant on September 19, 2002 and on that date, claimant still had ongoing complaints of low back pain, particularly when lifting or carrying and transitioning between positions.[9] As of September 19, 2002, Dr. MacMillan released claimant and assigned a 15 percent permanent partial impairment to the body as a whole. Consistent with his earlier opinions, he testified that none of the 15 percent is attributable to a work-related event.[10] Dr. MacMillan testified claimant sustained no real injury on February 23, 2001 as he had been injured in January and any physical complaints he had were attributable to the January 2001 slip and fall. He imposed a single restriction of no lifting greater than 50 pounds for the first year after surgery. Beyond that, claimant has no restrictions. Dr. MacMillan also noted that claimant's reported level of functioning was

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[7] *Id.* at 3.

[8] *Id.* at 4.

[9] MacMillan Depo. at 13-14.

[10] *Id.* at 15.

somewhat at odds with the physical abilities the doctor observed during the examination. Dr. MacMillan apparently observed claimant leaving the building and placing his child in the car seat and leaving the parking lot. His movements during this period of time were, in Dr. Macmillan's view, inconsistent with those demonstrated during the examination.

Dr. Truett Swaim then examined claimant on February 27, 2003 at the request of claimant's attorney. He diagnosed claimant with post-interbody fusion with cage at L5-6 along with ongoing pain with lumbar radicular symptoms. Dr. Swaim concluded the February and April 2001 accidents aggravated claimant's preexisting degenerative condition in his lumbar spine as did the January 2001 slip and fall.[11] He assigned a 26 percent permanent partial impairment to the whole body under the range of motion model set forth in the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, 4th ed. (*Guides*) for all of claimant's ongoing physical problems, not just for those attributable to each accident. This rating includes the surgery from 1983, degenerative changes, the effects of claimant's slip and fall, and the two subsequent events alleged to have occurred in the workplace. When asked, Dr. Swaim testified that he could not partition claimant's need for treatment or resulting permanency between the events of January, February and April 2001. He stated "there's kind of a progressive decrease in his functional capabilities after each injury."[12]

Dr. Swaim also testified that, according to the DRE model of the 4th edition of the *Guides*, claimant would have had a preexisting impairment of at least 10 percent as a result of the surgery in 1983.[13] Finally, he assigned a 47 percent task loss based upon the analysis provided by Michael Dreiling which outlined 17 individual tasks.[14] This task loss is premised upon Dr. Swaim's restrictions which limit claimant's ability to exert up to 15 pounds of force only occasionally, 10 pounds of force frequently, and 5 pounds of force constantly. Claimant is to avoid repetitive bending, stooping, twisting, squatting, climbing, kneeling, or crawling and avoid prolonged sitting, standing, or walking along with repetitive or forceful use of the upper extremities.[15]

According to Mr. Dreiling's May 30, 2003 report, claimant's capacity to earn wages as a taxi driver was somewhere between $6 and $8 dollars an hour, depending on whether claimant worked in Lawrence, Kansas, or a larger metropolitan area. Unfortunately, claimant was injured in two subsequent motor vehicle accidents while driving a taxi and is

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[11] Swaim Depo. at 9-10.

[12] *Id.* at 11.

[13] *Id.* at 23-25.

[14] *Id.* at 18-19.

[15] *Id.,* Ex. 2 at 8-9.

no longer working. When he was working, the record indicates claimant was earning an average of $278.63 per week.

Following his release from Dr. MacMillan, claimant testified that he went to respondent's business and asked for accommodated work. He was given an application for employment but according to claimant, he concluded respondent wasn't going to hire him so he did not fill out the form or follow up with respondent in any way. This fact was confirmed by Paula Sorg, the human resources manager. She testified that claimant was eligible for rehire and had he submitted an application, he might or might not have been hired.[16]

The Board has reviewed and considered the record as a whole as well as the arguments of counsel and concludes the Award should be affirmed in part and modified in part. The Board finds that claimant sustained a personal injury arising out of and in the course of his employment both on February 23 and April 10, 2001. Although respondent adamantly maintains claimant failed to prove that he sustained a physical injury on either of those dates, the claimant's testimony as well as that of Dr. Swaim and Dr. Amundson establish he did. While claimant did have a slip and fall accident at home injuring his back in January 2001, he returned to work at his regular position without any sort of restrictions. His job for respondent as a press operator was rather strenuous requiring him to lift large rollers and other objects. Either one of the claimant's subsequent accidents in February or April 2001 may well have only been an aggravation of that prior injury, but even at that, it is compensable under Kansas law.[17]

As for respondent's contention that the ALJ erred in not assigning a separate permanent impairment to each of the accidents, under the facts of this case, the Board disagrees. In this case there are two separate claims that have been formally consolidated for trial. In spite of the consolidation, claimant's evidentiary burdens are the same. The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.[18] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[19]

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[16] Sorg Depo. at 7.

[17] *Hanson v. Logan U.S.D. 326*, 28 Kan. App.2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[18] K.S.A. 44-501(a)(Furse 2000); *see also Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993) and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

[19] K.S.A. 2001 Supp. 44-508(g); see also *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

The difficulty here is that claimant was injured in a compensable accident and before he was able to achieve maximum medical improvement and establish permanency, he was injured in another compensable accident, to the same area of the body, while in the same respondent's employ and under the same carrier's coverage period. Under these circumstances, the Board finds that it is not necessary to apportion the permanency.

In any event, the Board is not persuaded that it is more probably true than not that claimant has established that any permanency occurred as a result of the February 23, 2001 accident. There is very little, if any, evidence indicating how claimant's condition permanently changed following the February 23rd accident, other than the uncontroverted evidence that claimant was transferred to the quarterfold machine, a job that was lighter than the job had previously performed. Dr. MacMillan, who saw claimant after the April 10, 2001 accident, indicated that of the 15 percent impairment he assessed, none of it was due to either work-related injury while Dr. Swaim, who saw claimant after his surgery and release, assessed a 26 percent rating without apportioning between either of the work accidents or prior events, other than to say that the 1983 surgery would have rendered at least a 10 percent impairment under the 4th edition of the *Guides*.

The Board, however, is persuaded that claimant sustained a permanent impairment following the April 2001 accident. Following that accident claimant was seen and treated by Dr. MacMillan and evaluated by Dr. Amundson. Claimant then had surgery, and in September 2002 was released from treatment. Although Dr. MacMillan finds that none of the 15 percent permanency is attributable to either work-related accident, Dr. Swaim's testimony, taken as a whole certainly suggests that at least some of the 26 percent he assigned was due to the April 10, 2001 accident. The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.[20] In this instance, the Board finds that claimant sustained a 26 percent functional impairment as a result of his April 10, 2001 accident, which is filed as docket No. 265,698.

Under K.S.A. 44-501(c)(Furse 2000), awards are reduced by the amount of preexisting functional impairment when a preexisting condition is aggravated. That statute provides:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

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[20] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

The medical testimony indicates claimant had a laminectomy in 1983 and according to Dr. Swaim, such surgery would entitle an employee to a 10 percent impairment under the 4th edition of the *Guides*. The Board finds that respondent has appropriately established claimant's preexisting impairment and therefore, claimant's functional impairment is reduced to 16 percent.

Whether claimant is entitled to benefits beyond his functional impairment is governed by K.S.A. 44-510e(a). That statute states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of injury and the average weekly wage the worker is earning after the injury.

K.S.A. 44-510e sets forth the formula for determining claimant's permanent partial general disability beyond just the functional impairment. This statute must be read in light of *Foulk*[21] and *Copeland*.[22] In *Foulk,* the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wage being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work injury.

According to these appellate court decisions, in determining work disability, the determinative question is whether the worker has made a good faith effort to find and/or retain appropriate employment. If the worker has made a good faith effort, then the actual difference in pre and post-injury earnings is used in the permanent partial general disability formula. If the worker has not made a good faith effort, then a post-injury wage should be imputed. Consequently, workers who are earning less than 90 percent of their pre-injury wage and have acted in good faith are entitled to receive an award for work disability.

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[21] *Foulk v. Colonial Terrace*, 20 Kan. App.2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[22] *Copeland v. Johnson Group, Inc.*, 24 Kan. App.2d 306, 944 P.2d 179 (1997).

The ALJ concluded claimant had no wage loss because he failed to demonstrate good faith when he took an application for re-employment in September of 2002 and failed to return it assuming he would not be hired. While the evidence on that issue indicates respondent might or might not have rehired him, claimant should have made the effort to fill out an application for employment. This fact alone suggests a lack of good faith. Claimant subsequently found employment as a taxi driver earning an average of $278.63, but later lost that job as a result of unrelated motor vehicle accident. The Board finds that claimant has failed to seek out appropriate employment after ceasing his job as a taxi driver. Accordingly, the wage he earned as a taxi driver will be imputed as it most accurately reflects his capacity to earn wages. That leaves claimant with a 49 percent wage loss as a result of his April 2001 accident.

Turning now to the second component of the work disability analysis, the record contains a single opinion on claimant's task loss, that of Dr. Swaim's 47 percent. There is no evidence that claimant had any restrictions prior to the commencement of his employment with respondent. Although claimant had low back surgery in 1983, that procedure was well before the 15 year period contemplated by the statute for purposes of computing task loss. Thus, even if claimant had restrictions from that procedure, they are not relevant to the task loss consideration in this claim. The focus here is on the tasks claimant performed in the last 15 years, dating back to 1986. The Board accepts Dr. Swaim's 47 task loss opinion as its own.

When the wage and task loss figures are averaged, the result is 48 percent. While this figure exceeds the net functional impairment, the Board must factor in the 10 percent preexisting impairment. When the preexisting impairment is considered, the result is 38 percent, which is more than the net functional impairment. The ALJ's Award shall be modified to reflect the Board's finding that claimant is entitled to a 38 percent permanent partial general bodily (work) disability.

Finally, the Board rejects respondent's arguments that the ALJ exceeded his jurisdiction in assessing the cost of the IME examination with Dr. Amundson against respondent and in his decision to issue the Supplemental Decision. The Act allows the ALJ to assess the costs for medical examinations to a party and that cost is typically assessed against the respondent and its insurance carrier.[23] The Board finds no compelling reason whatsoever to deviate from this practice and will not do so here.

As for the complaint that the ALJ erroneously issued the Supplemental Decision, the Board finds respondent's argument disingenuous. When the ALJ issued his order directing Dr. Amundson to conduct an IME, it was incumbent on both parties to provide the doctor with any and all medical records relating to the claimant. If respondent had records in its possession regarding claimant's slip and fall before Dr. Amundson's examination,

[23] K.A.R. 51-9-64.

then those should have been relayed to Dr. Amundson. The failure to do so merely invites the very error respondent is now complaining of. If respondent did not have the records at the time of the examination but discovered them later, then those could have been shared with Dr. Amundson and opposing counsel and the doctor could then be asked to comment on whether his causation opinions changed. If his opinions changed, then a deposition could have been taken and another preliminary hearing could have been held. This was not done. Instead, respondent merely continued to advance the argument that the ALJ committed a procedural error rather than focusing its argument on the necessity of the treatment and its relationship to the claimant's accident. Thus, the Board declines to overrule or set aside the ALJ's Supplemental Decision.

The other orders of the ALJ are hereby affirmed by the Board as if fully set forth herein to the extent they are not inconsistent with the above.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated February 23, 2004, is affirmed in part and modified in part as follows:

The claimant is entitled to 74.39 weeks of temporary total disability compensation at the rate of $185.76 per week or $13,818.69 followed by 135.13 weeks of permanent partial disability compensation at the rate of $185.76 per week or $25,101.75 for a 38% work disability, making a total award of $38,920.44.

As of August 26, 2004 there would be due and owing to the claimant 74.39 weeks of temporary total disability compensation at the rate of $185.76 per week in the sum of $13,818.69 plus 101.9 weeks of permanent partial disability compensation at the rate of $185.76 per week in the sum of $18,928.94 for a total due and owing of $32,747.63, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $6,172.81 shall be paid at the rate of $185.76 per week for 33.23 weeks or until further order of the Director.

**IT IS SO ORDERED.**

Dated this _____ day of August 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James L. Wisler, Attorney for Claimant
John D. Jurcyk, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director